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The Constitutional Supervision of Administrative Agencies in the Federal Republic of Germany: Similarities and Contrasts with American Law

Lee A. Albert
University at Buffalo School of Law

COMMENTS

The Constitutional Supervision of Administrative Agencies in the Federal Republic of Germany: Similarities and Contrasts with American Law

LEE A. ALBERT*

The thesis of Professor Lorenz' Article[1]—A Search for Possibilities, Means and Limits of Substantive Bonds, Leadership and Control of Administrative Activities—has a special timeliness for the United States. The fundamentals of federal administrative power in this country were once thought resolved when in 1946, by unanimous vote of both houses of Congress, the Administrative Procedure Act (APA) was enacted.[2] This statute has long been regarded as a basic legal charter for the federal administrative establishment.[3] Although certain questions of legitimacy lingered, the center of attention shifted from constitutional checks and balances to more particularized and interstitial issues of control and limits as the federal judiciary created a corpus of public law from the APA, the Constitution, and the general norms of the legal order.[4]

Despite the imposing edifice of procedural and substantive princi-

* Professor of Law, State University of New York at Buffalo. A.B. 1960, Rutgers; LL.B. 1963, Yale University.

1. Lorenz, *The Constitutional Supervision of the Administrative Agencies in the Federal Republic of Germany*, 53 S. CAL. L. REV. 543 (1980).

2. Administrative Procedure Act of 1946, P.L. No. 79-404, 60 Stat. 237 (codified at 5 U.S.C. §§ 551-706 (1976)).

3. *See* Vermont Yankee Nuclear Power Corp. v. National Resources Defense Council, Inc., 435 U.S. 519 (1978). The APA has been resistant to major amendments for the past three decades.

4. *See* Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV. 1041, 1041-42 (1975).

ples that federal courts have constructed over the last three decades, basic issues of control and legitimacy once again have emerged as the focus of debate over American administrative law. Widespread questioning of the accepted presuppositions of the federal administrative process and of the adequacy of existing mechanisms of accountability is the major theme of modern legal commentary on federal administration.[5] Such doubts provide the major impulse behind bold initiatives and proposals from all three branches of the federal government.[6] As in the formative period of American administrative law in the 1930's, the problem once again is to reconcile expansive delegation of power with processes of democratic control, scrutiny, and participation, and to provide more effective assurance of administrative responsiveness to legislated values. Recognition that federal courts alone cannot provide adequate solutions and that Congress and the President bear significant responsibilities are among the more promising themes in this renewed quest for legitimate and responsible administrative policymaking.[7]

Two factors underlying the present pursuit of alternative mechanisms of control are similar to those prevailing in the Federal Republic: greater demands upon government for complex and specialized tasks, and the need for clear and comprehensive governmental policies on the one hand and flexible case-specific administrative decisions on the other, echoed in American legal jargon as rulemaking versus adjudication as the preferable mode for formulating administrative policy. Two other impulses behind reform are more indigenously American: regulatory failure and presidential abuse. These occur when bouyant expectations of national, social, and economic reform through the administrative process have yielded to a sober appreciation of the distance between regulatory objectives and actual achievements. Unsatisfactory regulatory outcomes occasionally are attributed to ill-conceived legislative programs, but more often to misguided and torpid administration. Many observers assert that federal agencies, in making discretionary choices, have failed to pursue or effectuate the goals of their legislative mandates and have been unresponsive to the groups, inter-

5. *See, e.g.*, Cutler & Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395 (1975); Freedman, *supra* note 4; McGowan, *Congress, Court, and Control of Delegated Power*, 77 COLUM. L. REV. 1119 (1977); Wright, Book Review, 81 YALE L.J. 575 (1972).

6. *See* Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 IND. L.J. 323 (1977); Bruff & Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977); McGowan, *supra* note 5, at 1135-42, 1162-65, 1168-69.

7. McGowan, *supra* note 5, at 1135-42, 1162-65, 1168-69.

ests, and collective values their programs were designed to serve.[8] Vietnam, then Watergate and its aftermath, have fueled anxieties over the constitutional imbalance created by the unchecked accretion of executive power and have provoked resounding appeals for Congress to reassert its legislative prerogatives.[9]

Professor Lorenz properly cautions that a sensitive awareness of the differences and similarities among governmental structures, constitutional provisions, historical circumstances, traditions, and conventions is particularly relevant to a comparative exploration of the legal norms that authorize, limit, and control administrative authority and that define the roles of legislative, executive, and judicial institutions. In addition, national governments have their own particular variety of informal influences and constraints on administration, founded on custom and convention and more political than legal, arising out of a myriad of interactions and relationships among government officials. Such leeway between formal authority and less visible controls often tends to elude domestic legal analysis and poses equally formidable problems for comparative assessment.[10] This Comment will not attempt to explore the implications associated with the structural and organizational differences in the legislative and executive branches of the United States and the Federal Republic of Germany. Instead, some apparent parallels and contrasts in the structure and functions of administrative agencies and the formal legal measures relied upon to cope with administrative government will be highlighted.

A thumbnail history of American administrative law with its initial and continuing emphasis upon independent regulatory commissions should assist in understanding some important differences between the United States and the Federal Republic in the prototype of federal administrative activity and some consequent differences in legal responses.

Administrative activity beyond ordinary executive enforcement of statutes had respectable precedent in nineteenth century America but recognition of administrative law as a system of interrelated legal limits and procedural requirements did not emerge in this country until the New Deal responses to the Depression, which marked a departure from

8. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1682 (1975); Wright, *supra* note 5, at 575-76, 578-79.

9. *See, e.g.*, Black, *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13 (1974).

10. *See* Rabin, *Administrative Law in Transition: A Discipline in Search of an Organizing Principle*, 72 NW. U.L. REV. 120, 121-35 (1977).

the tradition of a limited central government. The profusion of multi-membered specialized commissions with armories of powers over private business activities, coupled with the Supreme Court's first and last invalidations of a major governmental program on unconstitutional delegation of powers grounds,[11] provoked a searching controversy over the constitutional legitimacy of a system of burgeoning administrative authority and the inseparable need for the law to monitor and safeguard its exercise.

The organization and powers of the new administrative system posed fundamental theoretical questions under a Constitution that established three distinct branches of government, without reference to administrative agencies, and that carefully assigned the national legislative power to a representative Congress, the executive power to an elected President, and the judicial power to independent and secure federal judges. Notwithstanding this tripartite structure of government institutions exercising separate powers, the New Deal agencies were formally separate from the Congress, President, and federal courts, a "headless" fourth branch in the charged rhetoric of that era. Further, these unique institutions starkly combined the powers and functions of all three branches within one governmental institution. The New Deal proliferation of specialized commissions sparked a parallel struggle in the political arena over the propriety of massive governmental intervention in the economy and the practical dangers to liberty and property from such unaccountable concentrations of power under barely defined legislative mandates.

The responses to these issues during this formative era of the administrative process has had an enduring influence on the system of controls and limits comprising American administrative law. In particular, the multifunction independent agency with specialized jurisdiction over key sectors of the economy (*e.g.*, transportation, securities exchanges, labor relations, and trade practices) became the paradigm of administration at the federal level and, therefore, the focal point for the creation and elaboration of administrative law.[12] Although constraints and limits in administrative law today embrace far more federal activity than do the regulatory commissions, (*e.g.*, benefactory and managerial functions) the principles applied are primarily those initially

11. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

12. *See generally* R. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS (1941); J. LANDIS, THE ADMINISTRATIVE PROCESS 1-46 (1938).

formulated to govern the independent regulatory commissions. Indeed, it is both a strength and a weakness of American administrative law that it attempts to impose on the bewildering diversity of federal agencies and functions a relatively unitary framework of principles, doctrines, and concepts based on a general model of the administrative process. For example, the A.P.A. procedural mandates apply to nearly all exercises of executive and administrative authority, and courts employ the mandates in judging the validity of such diverse administrative actions as the denial of a broadcast license, the revocation of welfare benefits, and the licensing of a nuclear energy facility.

Despite this nation's commitment to constitutionalism, Americans have no adequate constitutional theory underpinning the formal independence of the regulatory commissions from the executive branch of government. In holding that a member of the Federal Trade Commission was not subject to the President's plenary removal power over policymaking executive officials, the Supreme Court's single attempt to provide such a theory reveals the theoretical vacuum: "To the extent that it exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government."[13] The Court also reminds us that each of the three departments of government must be free from the control of the others. Protecting the judicial function from executive domination is apt and understandable,[14] but the premise that proper effectuation of a congressional mandate must be outside the President's constitutional responsibility to execute faithfully the laws[15] is incongruent with the constitutional trilogy. Similarly, despite heroic attempts, we are without a satisfying theory for justifying the combination of legislative, executive, and judicial functions under a Constitution that decrees their separation necessary for the responsible exercise of power. Observation that distinctions between the three powers are not precise and become blurred at the edges or that the Constitution itself endorses the President's veto in the legislative process is not a persuasive justification for a designed combination of the essence of legislative, executive, and judicial power in a single governmental institution.

13. Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935). *But see* Myers v. United States, 272 U.S. 52, 163-64 (1926).

14. *See* Wiener v. United States, 357 U.S. 349 (1958).

15. U.S. CONST. art. II, § 3.

These constitutional doubts have not entirely disappeared; coupled with the remaining influence of a laissez-faire economic philosophy, they have significantly influenced attitudes and law regarding federal administration. Most broadly, federal regulatory activity has been viewed not to be quite wholesome or healthy fare and hence to be accepted with commensurate caution. Similarly, the performance of regulatory agencies has been the subject of much critical examination and commentary; the crisis of the administrative process and proposals for radical surgery have been constantly reiterated.[16] Although the details vary from decade to decade, such chronic disquiet and attack appear to implicate principle as well as the goals of expediency and effectiveness.

Skepticism and scrutiny are not limited to legal pundits. Because the independent commissions are beyond the mantle of a constitutionally ordained department of government, all three branches assert and exercise control over these agencies without the deference to which a coordinate branch of government would be entitled. Agency isolation is not only reflected in conflicting proprietary claims of Congress and the President but reverberates in the expansive and searching character of judicial review of agency action, perhaps best captured in the judicially imposed conception of a court-agency partnership in the enterprise of public administration.[17]

Accordingly, the significant characteristics of American administrative law reflect this early preoccupation with the independent commissions. Such basic themes as highly permissive delegations, rigorous agency procedures for rulemaking and adjudication, and intense judicial scrutiny of substance as well as process have been tailored to fit the constitutional status, specialized tasks, and decisional impacts of these agencies.

Professor Lorenz observes that initial parliamentary authorization is required for most administrative acts in the Federal Republic with the exception of certain managerial functions (prisons for instance) where original legislative power or rules without statutory bases are permissible.[18] Perhaps his reference here is to degree of legislative specificity but the principle of administrative power without a statutory

16. *See, e.g.*, Cutler & Johnson, *supra* note 5; Freedman, *supra* note 4; Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960); Robinson, *On Reorganizing the Independent Regulatory Agencies*, 57 VA. L. REV. 947 (1971).

17. *E.g.*, Greater Boston Television Corp. v. FCC, 444 F.2d 841, 850-52 (D.C. Cir. 1970), *cert. denied*, 406 U.S. 923 (1972).

18. Lorenz, *supra* note 1, at 555-56.

foundation is inadmissible in American law. At a minimum, Congress must legislate a charter for an administrative body and outline its powers and areas of responsibility. In this limited sense, the constitutional allocation of legislative power to Congress remains operative.[19] To be sure, a legislative mandate carries with it a variety of implicit powers justifying procedural and organizational rules necessary for implementing a program. But Americans would distinguish sharply between this implied authority and the existence of original lawmaking power in an administrative body. Moreover, except for certain institutions for which a specific constitutional guarantee endorses decentralized decisionmaking (*e.g.*, public education), administrative discretion, autonomy, or creativity is rarely regarded as more desirable than legislative specificity and control.

The modern American judicial articulation of the constitutional doctrine of delegation is similar to that in the Constitution of the Federal Republic. Some degree of legislative definition of goals and standards is required,[20] but the vitality and application of the delegation doctrine apparently differ. The Supreme Court's singular application of the delegation doctrine in 1935 and its subsequent exhortation in judicial decisions and legal commentary has not induced Congress to be more precise or directive in its expansive grants of lawmaking powers. Broad-gauged and ill-defined administrative authority invariably survives judicial challenge.

The substantive regulatory tasks and procedures of the independent regulatory commissions illuminate this unusual divergency between judicial rhetoric and holdings in delegation controversies. Indeed, the vast discretionary authority vested in these politically unaccountable bodies, in contrast to delegations to the President or high executive officials, has had greater immunity from scrutiny under the delegation doctrine. Their substantive programs initially at least were least susceptible to advance congressional specification of policy and direction. The New Deal controls over dynamic and rapidly changing sectors of the economy were both unprecedented and experimental; regulation entailed continuous investigation, decision, and revision of specialized, technical, and complex issues prior to emergence of basic policy ques-

19. *See* National Cable Television Ass'n v. United States, 415 U.S. 336 (1974); Yakus v. United States, 321 U.S. 414, 425 (1944); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 144 (1941).

20. *See* Arizona v. California, 373 U.S. 546, 589-90 (1963); Yakus v. United States, 321 U.S. 414, 425 (1944); Amalgamated Meat Cutters & Butcher Workmen v. Connally, 337 F. Supp. 737, 746-47 (D.C. Cir. 1971).

tions. Given that these programs were the prototype of federal administrative action, the Supreme Court's acceptance of near-standardless grants of lawmaking power was an acknowledgement that Congress was ill-equipped to do more than paint broadly. It also was an acknowledgement that a distinction between legitimate delegations compelled by subject matter and delegations for reasons of political maneuvering or irresponsibility would be an elusive one for federal courts to make. The costs of error counselled restraint. Moreover, as the National Industrial Recovery Act (NIRA) cases illustrate, orderly and structured processes and procedural safeguards figured as large in the Court's delegation calculus, as did the source of lawmaking authority in a representative democracy.[21] Unlike NIRA administration, the independent commissions well satisfied such procedural concerns, and federal courts were both available and institutionally competent to assure procedural fairness and articulated reasoned decisions.

Some American commentators advocate the transformation of delegation as a theoretical limit on legislative power into a more practical control on unavoidable discretionary power, arguing for a judicially imposed condition that agencies, in response to regulatory experience, formulate rules and standards to narrow and channel the contours of initial grants of authority.[22] The objective behind this reformulation is predictability and clarity in the law applied by agencies. But by substituting administrative for legislative standards, this position abandons concern over a politically representative and accountable source of lawmaking authority. In contrast are the increasing appeals for judicial revitalization of the constitutional delegation doctrine as a means of requiring Congress to fulfill its constitutional lawmaking responsibilities.[23]

There are yet some flickers of life in delegation as it relates to policymaking in a democratic society, a less systematic and developed parallel to what Professor Lorenz describes as required parliamentary ordering of administrative action that affects constitutional private interests and a broader category of "essential decisions."[24]

21. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935); Panama Refining Corp. v. Ryan, 293 U.S. 388, 430 (1935).

22. *See* K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 55-59 (1969); Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969).

23. *See, e.g.*, G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 424-25 (1975); T.J. LOWI, THE END OF LIBERALISM 297-99 (1969); McGowan, *supra* note 5, at 1128-30; Wright, *supra* note 5, at 593-97.

24. Lorenz, *supra* note 1, at 559-61.

A similar insistence that Congress squarely confront and decide certain issues instead of leaving them to the discretionary authority of administrative bodies is reflected in scattered Supreme Court decisions. But the technique is to apply a special canon of statutory construction—the requirement of "clear legislative statement"—to construe narrowly a delegation that infringes upon fundamental individual liberties or raises other basic questions of political accountability. The classic example is *Kent v. Dulles*,[25] in which the Secretary of State pursuant to an apparently unrestricted and vintage grant of discretion to the President over passports denied passports to members of the Communist Party. Observing that a constitutionally sensitive area of liberty to travel was at risk, the Court held that Congress had not specifically made Communist Party membership a ground for refusing a passport. The considerable evidence of customary practice suggesting that Congress had approved (albeit offhandedly and not explicitly) was rejected because the constitutionality of such practices had not been squarely confronted by Congress or the President in the ordinary lawmaking process. The scope of *Kent* perhaps was impaired several years later when the Court upheld, on statutory and constitutional grounds, the Secretary of State's use of area controls to restrict travel under the same vague delegation.[26] The customs were not clearer than those in *Kent*, and the travel restriction, at a minimum, posed a serious constitutional question although ultimately the restriction was found to be valid. Taken together, these cases appear to restrict the clear and specific legislative authorization doctrine to instances when administrative action actually violates rather than impinges upon a constitutionally protected interest.

There are, however, similar selective exclusions from vague delegations to congressional investigatory committees, the Secretary of Defense, and other officials based on the requirement that Congress must specifically authorize constitutionally dubious exercises of authority.[27] Moreover, the technique has been utilized in several contexts to protect individual interests when an agency invoked questionable procedures or formulated dubious substantive policies affecting individual liberty.[28] In *Greene v. McElroy*,[29] for instance, the Court declined to up-

25. 357 U.S. 116 (1958).

26. Zemel v. Rusk, 381 U.S. 1 (1965).

27. *See, e.g.*, Greene v. McElroy, 360 U.S. 474 (1959); Watkins v. United States, 354 U.S. 178 (1957); Rumely v. United States, 345 U.S. 41 (1953).

28. *See* Hampton v. Mow Sun Wong, 426 U.S. 88 (1976); Schneider v. Smith, 390 U.S. 17, 26-27 (1968). *See generally* A. BICKEL, THE LEAST DANGEROUS BRANCH 159-69 (1962).

29. 360 U.S. 474 (1959).

hold an implicit grant of authority to the Defense Department to administer a security clearance program affecting eligibility for employment that contained inadequate procedural safeguards. "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them."[30]

More recently, the clear statement principle was extended to an "essential decision," when the Court perceived the administrative imposition of fiscal exactions on two regulated industries to defray the costs of administration under an ill-defined but broad statute as more similar to a tax than a fee for services.[31] The Court narrowed the statute "to avoid constitutional problems"[32] and found that the agencies had acted ultra vires. The constitutional problem was not individual or economic liberty but separation of powers, based on the premise that the power to tax is a "legislative function" peculiarly within the purview of Congress. Given this nation's long tradition of detailed and tight control over taxation, a novel delegation of taxing authority requires an unambiguous and forceful endorsement by Congress.

Such statutory interpretation is not derived from legislative history or purpose. Instead, it reflects the Court's attempt to impose on Congress an obligation to confront, deliberate, and speak unequivocally on certain significant questions. Like the delegation doctrine, its purpose is to keep clear the channels of policymaking and lines of responsibility in a representative democracy. Unlike delegation, the technique is more discriminating. It substitutes selective surgery for wholesale invalidation of a program. In relying on statutory construction, the Court also avoids invoking final constitutional ultimatums.

Administrative action affecting freedom of expression or operating as a prior restraint is subject to special and rigorous constitutional principles based upon a specific constitutional prohibition rather than separation of powers constraints. Hence, statutes restricting speech, assembly, or the press may not "overbroadly" inhibit protected private activity under the first amendment along with unprivileged conduct.[33]

30. *Id.* at 507.

31. Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 349-351 (1974); National Cable Television Ass'n v. United States, 415 U.S. 336, 342-44 (1974).

32. National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974). *See also* Federal Power Comm'n v. New England Power Co., 415 U.S. 345, 351 (1974).

33. *E.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971); Cantwell v. Connecticut, 310 U.S. 296 (1940).

Similarly, laws authorizing administrative agencies to issue permits for the use of public forums as places of assembly and expression must limit the determination to time, place, and manner without leeway for covert choice among messages or views to be presented.[34] In addition, the due process guarantee of fair notice requires some degree of definiteness in a standard of conduct as the basis for imposing sanctions on private behavior.[35] Reflecting a bifurcation of administrative and constitutional law in American legal thought and pedagogy, these special restrictions are regarded as substantive constitutional constraints on governmental action rather than limits on the delegation of administrative authority.

Although Congress has long relied upon the federal judiciary to insure responsible administration, it has recently manifested an interest in retaining more control over the scope and use of the authority conferred upon administrative officials, not through refined initial delegations but primarily in proposals that would give either House of Congress a veto over administrative rules and regulations.[36] Such nullification provisions have been adopted in a score of separate administrative programs dealing with sensitive or volatile issues,[37] and several current proposals extend applicability to practically the entire range of federal agency rules and regulations.[38] Typically, such veto authority permits either House of Congress to adopt a resolution, within a specified time period, disapproving the rule on legal or policy grounds; some contemplate the action of both Houses. None, however, subject the legislative nullification of a rule to the President's veto power over ordinary legislation.[39]

One further variation in the proposals to increase political participation relies on a three-step process. First, all agency rules, including those of the independent commissions, would be submitted to the President for review, revision, or rejection in an informal rulemaking procedure that includes public participation. The rule then would be subject to the veto of either House of Congress. Finally, the courts would review any rule emerging from this process for compliance with the

34. *E.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); *see* Freedman v. Maryland, 380 U.S. 51 (1965).

35. *E.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

36. Bruff & Gellhorn, *supra* note 6, at 1369-1409; McGowan, *supra* note 5, at 1133-39.

37. *See* Abourezk, *supra* note 6, at 324; Bruff & Gellhorn, *supra* note 6, at 1381-1409.

38. *See* McGowan, *supra* note 5, at 1133-39.

39. U.S. CONST. art. 1, § 7.

agency's enabling statute.[40] The common theme behind all these proposals is to ameliorate the lack of public accountability in the administrative process while accepting the inevitability of broad delegations.

That separation of powers principles are alive and well in the United States may be seen in the variety of intricate constitutional objections to congressional review of administrative lawmaking. Some argue that a congressional veto of a rule on "policy" grounds is an encroachment upon the executive's constitutional power to administer statutory programs, a curious objection when applied to regulatory agencies outside the executive branch. A parallel argument challenges the veto as an infringement upon federal judicial power to the extent that it entails congressional review of the legality of administrative lawmaking. Further, congressional nullification evades the President's constitutional veto power over acts of Congress, and the one-House veto violates the principle of bicameralism. These proposals have provoked equally vigorous and diverse debate over whether the busy agenda of Congress permits it to participate effectively in the continuous process of administration, and whether such participation would result in better or more responsive agency policy-making.[41]

The centrality of the third branch—the courts—in administrative government also enters the controversy over legislative veto in the concern that such "reverse legislation" might severely curtail judicial scrutiny of agency rules by according them the implicit approval of Congress and hence the judicial deference normally afforded statutes of Congress.

Feasibility permits but a sketch of a few of the themes regarding the complex mainstay of control in American administrative law—judicial review of agency action.

In formulating the procedures agencies must follow, federal courts having general or nonspecialized jurisdiction have an ample reservoir of legal authority from which they may freely draw. Legal norms derived by the courts in their accepted role as the ultimate guardians of legality, radiations from the due process guarantees in the Constitution, and the provisions of the APA render a distinction between constitutional and nonconstitutional underpinnings for judicial control undiscernible and artificial. For example, in setting aside administrative

40. Cutler & Johnson, *supra* note 5, at 1414-17.

41. *See* Abourezk, *supra* note 6; Bruff & Gellhorn, *supra* note 6, at 1409-40; McGowan, *supra* note 5, at 1149-62; Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

action for failure to follow previously announced rules or settled patterns of precedent, or for unjustified retroactivity in applying new decisional principles, courts do not pause to specify the legal source of the controlling norm.[42]

Recognition of the political rather than expert or technical choices inherent in agency discretion together with increased distrust of the wisdom and responsiveness of agency decisions has led to a new era of more exacting judicial review, particularly reflected in rigorous scrutiny of factual and analytical bases of agency choices in rulemaking as well as adjudication.[43] Moreover, Congress has fortified this movement by providing demanding formulas for judicial review of agency rules in certain instances.[44]

The Supreme Court's scrutiny of a highly informal administrative action entailed in the Secretary of Transportation's approval of a highway grant in *Citizens to Preserve Overton Park, Inc. v. Volpe*[45] is illustrative. Although the Secretary's decision warranted "a presumption of regularity," that presumption did not "shield his action from a thorough, probing, in-depth review."[46] This searching review extended not only to the "range of choices that the Secretary can make" under the statute but also to "whether the Secretary properly construed his authority" and whether his "decision was based on a consideration of the relevant factors."[47] As indicated in *Volpe*, the traditional presumptive validity that attaches to agency rules frequently yields to a court's plenary power to interpret law. Moreover, the scope of agency discretion is that which remains after judicial construction of the enabling statute.

Searching review is also reflected in judicial transformation of the informal notice and comment rulemaking procedures, which require an agency to give notice of a proposed rule, afford persons an opportunity

42. *See* Vitarelli v. Seaton, 359 U.S. 535, 539-40 (1959); Moser v. United States, 341 U.S. 41, 46-47 (1951); NLRB v. Guy F. Atkinson, Co., 195 F.2d 141, 149 (9th Cir. 1952); International Business Machs. Corp. v. United States, 343 F.2d 914, 923-24 (Ct. Cl. 1965). *See generally* Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 456-61 (1974).

43. *See* Tanners' Council of America, Inc. v. Train, 540 F.2d 1188, 1193 (4th Cir. 1976); National Tire Dealers & Retreaders Ass'n v. Brinegar, 491 F.2d 31, 37-41 (D.C. Cir. 1974). *See generally* Gardner, *Federal Courts and Agencies: An Audit of The Partnership Books*, 75 COLUM. L. REV. 800 (1975); Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974).

44. Consumer Product Safety Act, 15 U.S.C. § 2060 (1976); Federal Occupational Safety and Health Act, 29 U.S.C. § 660 (1976); *see* Industrial Union Dep't v. Hodgson, 499 F.2d 467, 469 (D.C. Cir. 1974).

45. 401 U.S. 402 (1971).

46. *Id.* at 415.

47. *Id.* at 416.

to submit written comments, and then provide a brief explanation of the rule adopted. This legislative model for rulemaking leaves an agency free to consult any relevant material without notice and customarily provides a cursory justification for an agency choice. Because the record emanating from such informality does not permit serious exploration of the merits, the federal courts, to facilitate effective review, have required greater initial disclosure to the public of the data and analyses on which the agency may rely and a detailed agency response to public submissions challenging the proposed rule. Agencies may neither ignore this required dialogue with interested parties nor fail to provide a detailed response and explanation for final adoption of a rule.[48] Thus, elements of the adversary process have been injected into administrative lawmaking. At times, judicial assessment of agency rulemaking procedures—particularly the adequacy of responses to public evidentiary and analytical comments—is a procedural means of expressing dissatisfaction over substantive agency policies and outcomes. While the Supreme Court recently disapproved this lower court experiment in judicializing the informal rule-making process, it did not repudiate the underlying objective of assuring adequate agency exploration and justification in formulating policy through rules.[49]

The American commitment to the adversary process as the paradigm of fair legal procedure has traditionally required something similar to a judicial trial in adjudication by agencies in the business regulatory arena. A seminal article sixteen years ago observed that "[t]he law of government largesse has developed with little regard for procedure."[50] Developments since then, mostly judicial, are today well reflected in commentary expressing reservations over the imposition of trial-type hearing requirements on administrative action in "mass justice" programs, such as pensions, welfare, public housing, and disability benefits.[51] Hearing rights also attach to disciplinary actions against students, prisoners, holders of various permits and licenses, parolees,

48. *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 251-52 (2d Cir. 1977); Industrial Union Dep't v. Hodgson, 499 F.2d 467, 475 (D.C. Cir. 1974); Mobil Oil Corp. v. Federal Power Comm'n, 483 F.2d 1238, 1251-54 (D.C. Cir. 1973). *But see* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). *See generally* Breyer, Vermont Yankee *And the Courts' Role in the Nuclear Energy Controversy*, 91 HARV. L. REV. 1833 (1978); Byse, Vermont Yankee *and the Evolution of Administrative Procedure: A Somewhat Different View*, 91 HARV. L. REV. 1823 (1978); Stewart, Vermont Yankee *and the Evolution of Administrative Procedure*, 91 HARV. L. REV. 1805 (1978).

49. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

50. Reich, *The New Property*, 73 YALE L.J. 733, 783 (1964).

51. B. SCHWARTZ & H.W. WADE, LEGAL CONTROL OF GOVERNMENT: ADMINISTRATIVE

and, more unevenly, government employees.[52] Respect for accurate determinations, the individual dignity associated with participatory rights, the desirability of decisional visibility, and agency accountability have eroded the hoary distinction between rights and privileges that once served as the test for determining the applicability of procedural safeguards. Instead, the demanding and costly elements of the adversarial trial provide a yardstick for measuring the adequacy of agency process in individual cases.[53] An administrative hearing thus typically requires the rudiments of due process, a right to confront and cross-examine agency witnesses, to present one's own case, and to have a decision by an impartial official based solely on the evidence presented at the hearing. Explicit administrative findings and a formal transcript are the usual mechanisms used to insure the observance of these rights and to provide an adequate foundation for administrative appeals and judicial review.

The burdens of process are not irrelevant, however, and agencies are afforded considerable flexibility in accommodating trial-type safeguards to the variety of disputed factual issues, the different stakes at risk, and the agency's objectives involved in agency adjudication. Occasionally, administrative exigencies allow for the relaxation or omission of one or more of these elements of the adversarial process.[54] But these deviations are exceptions requiring special justification within the confines of a particular program. Because relatively elaborate procedures are the norm for most adjudicatory actions, the administrative hearing is not an auxiliary but a central control in American administrative law.

Other salient features of the recent judicial reformation of American administrative law include a marked relaxation of principles governing the availability and timing of judicial review and the class of persons entitled to participate in administrative proceedings and to ob-

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LAW IN BRITAIN AND THE UNITED STATES 132 (1972); Friendly, "*Some Kind of Hearing,*" 123 U. PA. L. REV. 1267, 1279-1304 (1975).

52. *See* Goss v. Lopez, 419 U.S. 565, 577-84 (1975) (disciplinary action against students); Wolff v. McDonnell, 418 U.S. 539, 563-72 (1974) (disciplinary action against prisoners); Arnett v. Kennedy, 416 U.S. 134 (1974) (dismissal of government employee); Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973) (probation revocation); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits). *But see* Bishop v. Wood, 426 U.S. 341 (1976) (dismissal of police officer does not require hearing).

53. *See* Goldberg v. Kelly, 397 U.S. 254, 261 (1970); Greene v. McElroy, 360 U.S. 474, 496-97 (1959).

54. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 577-831 (1975); Wolff v. McDonnell, 418 U.S. 539, 566-72 (1974); Richardson v. Perales, 402 U.S. 389 (1971).

tain judicial review of administrative action.[55] A decade ago, the Supreme Court endorsed a strong presumption of reviewability in observing that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."[56] The APA exception for administrative actions committed by law to agency discretion, as qualified by review for abuse of discretion, now encompasses an exceedingly narrow band of administrative decisions that are not susceptible to rules or law (such as the choice among competing applicants for research grants), or decisions that entail high order foreign policy or defense considerations.[57] Similarly, most formal administrative rules may be challenged in court prior to invocation against particular persons. Individuals and groups subject to a rule need not choose between costly compliance and risky violation to secure a judicial determination of a rule's validity under the prevailing standard of ripeness.[58]

Liberalized American rules of standing appear to contrast sharply with those of the Federal Republic. Under present American standards, any class of interests that an administrator is required by statute implicitly or explicitly to consider in making policy choices is entitled to challenge an agency determination in court. Hence, judicial review is available to members of large, unorganized classes with diverse interests, such as consumers, environmentalists, and television viewers. That any individual member's stake in agency policy is comparatively modest, or indeed minute, is no barrier to entitlement to participate in administrative proceedings and thereafter to obtain judicial review.[59] Indeed, some American courts have characterized litigants with such modest interests as representative of the public interest, thus viewing judicial surveillance as serving the effectuation of public values. This view has not been endorsed by the Supreme Court and rules of standing still require an identifiable personal stake in the administrative action under challenge.[60]

Nonetheless, the extension of standing to such a broad range of affected interests reflects a widespread judicial reaction to perceived

55. *See* Stewart, *supra* note 8, at 1081-88.

56. Abbott Laboratories v. Gardner, 387 U.S. 136, 140 (1967).

57. *Compare* Curran v. Laird, 420 F.2d 122, 131 (D.C. Cir. 1969) *and* Kletschka v. Driver, 411 F.2d 436, 442-44 (2d Cir. 1969) *with* Gonzalez v. Freeman, 334 F.2d 570, 575 (D.C. Cir. 1964).

58. *Compare* Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) *with* Toilet Goods Ass'n v. Gardner, 387 U.S. 158 (1967).

59. *See* United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 687-88 (1973); Barlow v. Collins, 397 U.S. 159 (1970).

60. Sierra Club v. Morton, 405 U.S. 727, 734-40 (1972).

agency failures to represent unorganized interests, and the corresponding need for judicial scrutiny to rectify such neglect. As candidly stated by then Circuit Judge Burger:

> The theory that the Commission can always effectively represent the listener interests . . . is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption . . . neither we nor the Commission can continue to rely on it.[61]

Such widely shared skepticism over the responsiveness of federal agencies to legislated values not represented by organized, cohesive interest groups has had a powerful effect on judicial scrutiny of agency action particularly when agencies purport to accommodate competing and often conflicting relevant interests. The line between permissible agency discretion to balance and reconcile, and agency abuse of discretion in affording undue weight to a particular interest, has become blurred. Reviewing courts have engaged in more open and explicit scrutiny of substantive agency policies because of the considerable and persuasive input of newly organized noncommercial interest groups. In taking a "hard look" at agency decisions combining technical factors with important value choices, conclusory assurances and the invocation of expertness frequently are not sufficient for long-range or important policy outcomes affecting the environment, safety, health, and important personal interests. Full and persuasive articulation has become the key component of the judicial demand for reasoned decisionmaking.[62]

These and other innovations in administrative law during the last decade demonstrate the resourcefulness and creativity of the federal judiciary. Significant expansion of judicial review has taken place and Congress has responded with increased reliance on the courts and approval of more exacting review, even requiring it in many new administrative programs.[63] But the judicial swathe in the landscape should not be overdrawn. The elusive line between a judicial checking function and administrative planning and policy creation has not been abandoned, however intense the search for responsible decisions. A

61. Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003-04 (D.C. Cir. 1966).

62. *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977); Tanners' Council of Am., Inc. v. Train, 540 F.2d 1188 (4th Cir. 1976); Amoco Oil Co v. Environmental Protection Agency, 501 F.2d 722 (D.C. Cir. 1974). *See generally*, K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 29.01-2 (Cum. Supp. 1977); Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 COLUM. L. REV. 721 (1975).

63. *See* note 44 *supra*.

well established legal tradition providing contours for judicial power, along with acknowledged institutional limitations on the capacities of generalist courts, are potent forces in maintaining an imprecise division between legality and wisdom. Indeed, the Supreme Court recently reminded lower federal courts in unusually forceful terms that they may not impose the "best" solutions, even procedural ones, on the administrative establishment.[64] Judicial review has become neither a substitute for an ombudsman in monitoring the administrative process nor a panacea for its ills.

64. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).